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Case No. 81-2298

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1981

PHILLIP BONELLO,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PERIOD OF ACTUAL INCARCERATION OF EIGHTEEN MONTHS PROVIDED FOR IN SECTION 2925.03, OHIO REVISED CODE, FOR OFFENDERS CONVICTED OF TRAFFICKING IN DRUGS UNDER SECTION 2925.03 (A) (4), OHIO REVISED CODE, A THIRD DEGREE FELONY, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT FOUND IN THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT VIII, CONSTITUTION OF THE UNITED STATES

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2925.03, OHIO REVISED CODE ANNOTATED (PAGE'S 1982)

(A) No person shall knowingly do any of the following: * * * *

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount; * * * *

(C) If the drug involved is any compound, mixture, preparation or substance included in Schedule I with the exception of marijuana or in Schedule II, whoever violates this section is guilty of aggravated trafficking. * * * *

(4) Where the offender has violated division (A) (4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months . . . .

SECTION 2925.01 (D), OHIO REVISED CODE ANNOTATED (PAGE'S 1982)

(D) "Actual incarceration" means that a person is required to be imprisoned for the stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole, except that a person may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilities, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or the department of mental retardation and developmental disabilities against the period of actual incarceration. An offender serving actual incarceration is eligible for diminution of his minimum sentence pursuant to section 2967.19 of the Revised Code if confined in a state penal institution or pursuant to criteria established by the adult parole authority pursuant to division (E) of section 2967.01 of the Revised Code if confined in a state reformatory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

STATEMENT OF THE CASE

Petitioner was indicted by a Franklin County, Ohio grand jury for three counts of aggravated trafficking under Section 2925.03, Ohio Revised Code. Petitioner entered a plea of no contest to a stipulated lesser included offense of count three of the indictment, possession of Lysergic Acid Diethylamide (LSD), a violation of Section 2925.03 (A) (4), Ohio Revised Code. Under Section 2925.03 (C) (4), Ohio Revised Code, a violation of Section 2925.03 (A) (4), is a third degree felony with a period of actual incarceration of eighteen months. (Parenthetically, we note that petitioner's brief inadvertently mentions Sections 2925.03 (A) (6) and 2925.03 (D) as being the relevant provisions involved. This has no impact on the merits of petitioner's legal argument.)

The facts related by the state at the no contest plea hearing indicated that the petitioner offered to sell a police officer and an informant eight hundred "hits" of LSD as well as marijuana. Petitioner was arrested in a vehicle containing 11,200 "hits of acid", and petitioner was the person who was selling and transporting the LSD. Petitioner did not contest those facts. The trial court entered a finding of guilty of the stipulated lesser included offense of count three of the indictment, and a *nolle prosequi* was entered to the remaining two counts. Petitioner was given a sentence of two to ten years, which included a period of eighteen months actual time, in a state reformatory.

Petitioner pursued a delayed appeal from his conviction to the Tenth District Court of Appeals, Franklin County, Ohio. In a unanimous decision rendered and journalized on September 29, 1981, the Court of Appeals affirmed the judgment of the trial court. Leave to appeal was denied by the Ohio Supreme Court on March 9, 1982.

SUMMARY OF ARGUMENT

The actual incarceration provisions of Section 2925.03, Ohio Revised Code, constitute a reasonable exercise of the police power of the state and advance a legitimate state interest. The imposition of a term of actual incarceration for drug trafficking offenses is not an unreasonable or arbitrary classification and does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. A term of eighteen months actual incarceration included in a sentence for a third degree felony drug trafficking offense is not cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States.

REASONS FOR DENYING THE WRIT

A. While under the Constitution all laws of a general nature must have uniform operation, there is an inherent power in the legislature to create classifications of persons, and, if such classifications are reasonable, the constitutional requirement is satisfied. *State* v. *Martin*, 168 Ohio St. 37, 39 (1958). Legislative categories must be respected if the distinctions drawn have some basis in practical experience or if some legitimate state interest is advanced. *McGinnis* v. *Royster*, 410 U. S. 263 (1973).

An exercise of the police power is valid if it bears a real and substantial relation to the public health, safety, morals or general welfare and if it is not unreasonable or arbitrary. *Benjamin* v. *Columbus*, 167 Ohio St. 103 (1957). The burden is upon the party attacking the legislative classification to demonstrate that it is erroneous and to negative every conceivable basis which might support it. *Madden* v. *Kentucky*, 309 U.S. 83 (1940).

The actual incarceration provisions for drug offenses constitute a reasonable response on the part of the legislature to deal with the growing problem of the sale and distribution of illegal narcotics and to deter potential offenders. Such penalties are a rational and valid exercise of the state's power to protect the public health, safety and welfare, and petitioner has failed to demonstrate how this legislative solution is arbitrary or unreasonable.

Petitioner argues that the actual incarceration period resulted in his receiving more severe punishment than those convicted of other felonies of like degree but who are eligible for parole. This Court addressed a similar claim *Collins* v. *Johnston*, 237 U. S. 502, 35 S. Ct. 49 (1915)

and rejected the contention that the principles of equal protection had been violated, stating *Id.*, 35 S. Ct. at 653:

> "(t)he comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the state itself to determine."

The Ohio Legislature has concluded that drug trafficking offenses are serious enough to merit the sanction of a period of actual incarceration. The eighteen month period of actual incarceration imposed upon petitioner under Section 2925.03 was not in violation of the Equal Protection Clause.

B. Petitioner further contends that the actual incarceration period of eighteen months included in his two to ten year sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

This Court has stated that no static test can exist by which courts determine whether conditions of confinement are cruel and unusual, since the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes* v. *Chapman*, U. S. , 101 S. Ct. 2392, 2398 (1981), citing *Trop* v. *Dulles*, 356 U. S. 86 (1957). Similarly, the Ohio Supreme Court has noted that punishments prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community. *McDougle* v. *Maxwell*, 1 Ohio St. 2d 68 (1964).

The Eighth Amendment proscribes punishments grosly disproportionate to the severity of the crime. *Ingraham* v. *Wright*, 430 U. S. 651 (1977). However, a state has wide latitude in fixing punishment for state

crimes, and the severity of penalties is a matter for legislative determination. *Williams* v. *Illinois*, 399 U. S. 235 (1969) *Rummel* v. *Estelle*, 445 U.S. 263 (1980). It is also within the province of the legislature to establish the terms of parole eligibility.

The period of actual incarceration of eighteen months included in petitioner's two to ten year sentence for trafficking in large quantities of LSD is not a penalty grossly disproportionate to the severity of the crime. Actual incarceration, defined in Section 2925. 01 (D), Ohio Revised Code, is a reasonable legislative measure to aid in the deterrence of illegal drug dealing, and does not constitute cruel and unusual punishment.

It is respectfully submitted that the actual incarceration period in petitioner's sentence under Section 2925.03 violates neither the Equal Protection Clause of the Fourteenth Amendment nor the Eighth Amendment and that the Writ of Certiorari should not issue in this case.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of Practice of this Court, I hereby certify that three copies of the foregoing Brief of Respondent in Opposition to Certiorari was served upon Petitioner, Phillip Bonello, by forwarding three copies of the brief to his counsel, Mr. Frank A. Ray, 536 South High Street, Columbus, Ohio, 43215; by United States mail, postage prepaid, this 22 day of June, 1982. I hereby certify that all parties requested to be served have been served and that I am a member of the Bar of the Supreme Court of the United States.

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